

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1026 OF 2003
IN
SUMMONS FOR JUDGEMENT NO.1127 OF 2004
IN
SUMMARY SUIT NO. 1130 OF 2001

Dilnavaz P. Irani .. Plaintiff
versus
Mohan Asawa .. Defendant

...

Ms.Mohini Lund i.b Pallavi Desai for the plaintiff.
Mr.Uday Warunjikar for the defendant.

CORAM : D.G. KARNIK, J.

DATED : 17th March 2005.

P.C.:

1. Heard the learned counsel for the parties.
2. This motion is taken out by the defendant in the summary suit no.1130 of 2001 for setting aside an

ex-parte judgement and decree passed against him by the Court on 25th February 2003. The plaintiff in the suit had taken out the Summons for Judgement n.1127 of 2001 and same was served on the defendant on 11th October 2001. Under Order 37 Rule 2 of the Code of Civil Procedure, the defendant ought to have filed an application for leave to defend within a period of 10 days i.e. on or before 21st October 2001. The defendant did not apply for leave to defend for a period of more than 15 months thereafter. Therefore, Summons for Judgement was listed for ex-parte hearing on 24th February 2003. On that day, the defendant and his Advocate were absent and the Summons for Judgement was adjourned to 25th February 2003. Even on the adjourned date i.e. on 25.2.2003, the defendant and his Advocate were absence and therefore, the court made the Summons for Judgement absolute and decreed the suit ex-parte.

3. The present motion has been taken out by the defendant alleging that there was a sufficient cause in the absence of the defendant and his Advocate on 24th February 2003 and on 25th February 2003. Learned counsel for the defendant invites my attention to the averments in paragraph nos.5 and 6

of the affidavit in support of the Notice of Motion.

4. In *Rajnikumar vs. Suresh Malhotra* reported in AIR 2003 S.C. 1322, the Supreme Court has held that the provisions of Order 9 Rule 13 are not applicable to the summary suit. If an ex-parte decree has been passed in a summary suit, the defendant can make an application under Order 37 Rule 4 of the Code of Civil Procedure for setting aside the decree and if special circumstances are made out the Court cannot only set aside the decree but simultaneously grant him leave to defend the suit. The defendant is required to make out special circumstances for setting aside the decree passed against him. The Supreme Court has further held that for setting aside the ex-parte decree the defendant is required to show that the defendant has a defence and would be entitled to a leave to defend.

5. Affidavit in support of the motion filed by the plaintiff does not show that the defendant has a defence to the suit. However, the learned counsel for the plaintiff submits that an affidavit in reply to the Summons for Judgement was already prepared and

a copy of the same has been annexed as Exhibit-B to the affidavit in support of the motion. The learned counsel states that the said affidavit was already sworn on 25th February 2003 and was to be tendered to the Court on 25th February 2003. However, in view of the circumstances narrated in paragraph nos.5 and 6 of the affidavit in support of the Notice of Motion, the said affidavit could not be filed in the Court. Learned counsel therefore urges that the affidavit may be taken into consideration for the purpose of considering whether the defendant has a good defence and should be treated as a special circumstance within the meaning of Order 37 Rule 4 of the Code of Civil Procedure.

6. As stated earlier, the Summons for Judgement was served on the defendant on 11th October 2001 and he ought to have applied for leave to defend within 10 days i.e. on or before 21st October 2001. Admittedly, the defendant had not sworn in an affidavit of defence on a date earlier than 25th February 2003. Therefore, the said affidavit even if it was sworn in and was to be filed in the Court on 25th February 2003 was not within the prescribed time. The affidavit would not have been taken into

consideration by the Court as it was not filed within 10 days and no ground was made out for condoning of the delay in making the affidavit. Hence, affidavit dated 25th February 2003, copy of which is annexed at Exhibit-B to the Notice of Motion cannot be taken into consideration.

7. Assuming that I am wrong in ignoring the affidavit dated 25th February and the affidavit needs to be taken into consideration, I am of the view that the affidavit does not make out a good defence in the suit at all. It is firstly contended in the affidavit that the suit was barred by limitation. The suit is based on two promissory notes executed by the defendant on 26th January 1998 and 28th January 1998. The plaint has been lodged in the Court on 19th January 2001 i.e. within three years of the execution of the promissory notes. Therefore, the suit was within limitation.

8. In the affidavit, it is next submitted that this Court had no jurisdiction to entertain and try the suit because the defendant resides at Pune. In paragraph no.10 of the plaint, the plaintiff has averred that the money was advanced in Mumbai and the

defendant carries on business at Lohar chawl, Mumbai. The defendant has not specifically denied these specific averments made in the plaint. Since the loan was advanced at Mumbai and the whole of the cause of action is stated to have been arisen within Mumbai, this Court had the jurisdiction to entertain and try the suit.

9. It was lastly contended that since there were two promissory notes, one suit could not have been filed in respect of the two different causes of action. Under Order 2 Rule 3 of the Code of Civil Procedure, the plaintiff is entitled to continue in one suit all causes of action against the same defendant.

10. Thus, none of the defences raised by the defendant has any merit and even if the affidavit of the defendant is considered I would not have granted leave to the defendant to defend the suit. This is particularly so because the defendant has not denied the execution of the promissory notes. In my view, therefore, the defendant has not made out special circumstances under order 37 Rule 4 of the Code of Civil Procedure for setting aside of the decree.

10. Hence, motion is dismissed with costs.

D.G. KARNIK, J